

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 31, 2010 appellant, then a 48-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on August 29, 2010, she began to experience low back pain while banding flat nixie mail at work. She stopped work on August 29, 2010. On November 1, 2010 OWCP accepted appellant's claim for sprain of back, lumbar region. Appellant received wage-loss compensation on the supplemental rolls as of September 29, 2010, and on the periodic rolls commencing January 16, 2011.

On April 16, 2013 the employing establishment offered appellant a position as a limited-duty mail processing clerk. On April 22, 2013 appellant returned to duty, but ceased work after that date. On April 29, 2013 OWCP advised appellant that this position was suitable, and afforded her 30 days to accept and report for duty to the offered position or provide a written explanation of her reasons for refusal. On June 25, 2013 appellant was advised by OWCP that her refusal was not deemed justified, and she was afforded an additional 15 days to accept the job. Appellant did not accept the job or return to work within the 15-day time period.

On October 24, 2013 OWCP terminated appellant's compensation, pursuant to 5 U.S.C. § 8106(c)(2), due to her refusal of suitable work. An OWCP hearing representative affirmed the October 24, 2013 decision on July 15, 2014. Appellant requested reconsideration. By decision dated August 13, 2015, OWCP denied modification of the July 15, 2014 decision.

Appellant again requested reconsideration. In a December 8, 2015 decision, OWCP again denied modification, finding that the evidence of record established that appellant clearly refused or abandoned an offer of suitable employment under section 8106(c)(2) of FECA. Appellant was, therefore, not entitled to any further wage-loss or schedule award compensation benefits.

By letter received by OWCP on December 13, 2016, appellant again requested reconsideration. She argued that the evidence of record established that she had returned to work on April 22, 2013, but was unable to continue working after that date due to pain. Appellant also noted that the offered position was for only four hours a day. In further support of her request,

² 5 U.S.C. 8101 *et seq.*

³ Appellant timely requested oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated October 12, 2017, the Board exercised its discretion and denied the request as the Board did not have jurisdiction over the merits of the case and the arguments on appeal could adequately be addressed in a decision based on review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1450 (issued October 12, 2017).

appellant submitted copies of correspondence between her and OWCP dated November 12 and 27, 2016. She also submitted new claims for compensation (CA-7 forms) for total disability from November 12 through December 9, 2016.

In addition to this new evidence, appellant resubmitted evidence that was previously of record. This included two notes by Dr. Michael Hasz, appellant's treating Board-certified spinal surgeon, dated December 12, 2012 wherein he asked the employing establishment to provide appellant with a chair with an adjustable arm rest and back support as well as a headset. In addition, appellant resubmitted reports by Dr. Hasz dated April 29, 2013; November 24, 2014; and April 29, May 4 and 13, September 2, and October 9, 2015. She also resubmitted prescription/medical notes by Dr. Rajesh Sethi, a Board-certified neurologist, dated December 20, 2007 and April 30, 2015, and a note by Tracy Perkins, a physician assistant, indicating that appellant should be provided a chair with adjustable arm rests, height, and back support.

Nonmedical evidence submitted by appellant with her reconsideration request included job offers from the employing establishment dated December 10, 2012, April 16 and December 4, 20, and 22, 2013, May 13 and July 14, 2014, and February 24, 2015. Appellant also submitted letters she had sent to OWCP dated May 13 and 15, and July 23, 2015 as well as letters from OWCP to her dated January 18, 2013, and February 4, May 26, and July 20, 2015. She submitted SF-50 forms from the employing establishment dated December 4, 2013 and November 15, 2014, as well as multiple claims for compensation for total disability from October 31, 2015 through October 28, 2016 with supporting time analysis forms (CA-7a forms). OWCP also received an article from a union newsletter.

Appellant also submitted new reports by Dr. Hasz. In a report dated January 13, 2016, Dr. Hasz diagnosed sprain of ligaments of the lumbar spine, radiculopathy of lumbar region, sacroiliitis, and other intervertebral disc displacement in the lumbosacral region. He noted that appellant's symptoms were related to the work injury of August 29, 2010, and had flared up the previous day when she had to frequently change positions from sitting to walking as well as stooping and crouching. In a report dated June 15, 2016, Dr. Hasz diagnosed sprain of ligaments of lumbar spine, low back pain, sacroiliitis, radiculopathy, and other intervertebral disc displacement in the lumbosacral region. He noted that appellant had been prescribed a controlled substance for severe episodes of pain and was cautioned not to drive or operate hazardous equipment while taking narcotics. In a June 15, 2016 duty status report (Form CA-17), Dr. Hasz indicated that appellant could work four hours a day with restrictions prohibiting climbing, bending, stooping, twisting, pulling, and pushing. He limited sitting to two hours continuous and four hours daily. Dr. Hasz limited standing, walking, and reaching above the shoulder to one hour daily.

By decision dated December 21, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵ The one-year period begins on the next day after the date of the contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought.⁶ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employee's Compensation System (iFECS).⁷

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁸ OWCP regulations and procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁴ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient

⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ Federal FECA Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁷ *Id.* at Chapter 2.1602.4b.

⁸ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.3d (January 2004).

¹⁰ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹³ *See supra* note 11.

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁵

ANALYSIS

OWCP received appellant's request for reconsideration on December 13, 2016, which was more than one year after the December 8, 2015 merit decision.¹⁶ As appellant's request was untimely filed, she must demonstrate clear evidence of error on the part of OWCP.¹⁷

The Board finds that appellant has not demonstrated clear evidence of error. The underlying issue is whether OWCP properly terminated appellant's compensation commencing October 20, 2013 due to her refusal of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). The Board finds that the arguments and evidence submitted by appellant in support of her request for reconsideration did not raise a substantial question as to the correctness of the termination of her compensation.¹⁸ In support of her request for reconsideration, appellant contends that she accepted the offered position on April 22, 2013 and worked the entire day, but was unable to continue working due to pain. She also contends that the offered position was only for four hours a day. Appellant also submitted copies of job offers, employment forms, and correspondence with OWCP. Also, she submitted an article from a union newsletter. In the present case, the underlying issue is a medical issue.¹⁹ Therefore, this nonmedical evidence submitted on reconsideration is insufficient to demonstrate clear evidence of error. Furthermore, while appellant alleged that it was error for OWCP to offer her a job for four hours a day, she did not establish that this was clear error.²⁰

OWCP also received additional medical evidence in support of appellant's untimely request for reconsideration. While Dr. Hasz's reports are generally supportive of appellant's inability to work the offered position, they do not demonstrate clear error on the part of OWCP in its suitable work determination. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 5.

¹⁶ *J.M.*, Docket No. 15-1586 (issued March 23, 2016) (the Board explained that according to OWCP procedures, the received date is determined by the document received date in iFECS). Although appellant contends that her prior counsel submitted a request for reconsideration of the termination decision on April 5, 2016, the Board finds no such request in the record.

¹⁷ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁸ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁹ *See J.G.*, Docket No. 17-0709 (issued July 21, 2017).

²⁰ OWCP procedures provide that "Ideally, a job offer should be made for the number of hours for which a claimant has been released to work." *See* Federal (FECA) Procedure Manual, *Job Offers and Return to Work*, Chapter 2.814.4(c)(1) (June 2013).

medical opinion requiring further development, is not clear evidence of error.²¹ The reports by Dr. Hasz fail to raise a substantial question concerning the correctness of OWCP's last merit decision.²² The progress notes by Dr. Sethi similarly do not constitute the type of medical evidence which on its face demonstrates clear evidence of error on the part of OWCP. To demonstrate clear evidence of error, it is insufficient merely to establish that the evidence could be construed so as to produce a contrary conclusion.²³ The report from the physician assistant does not constitute competent medical evidence as a physician assistant is not considered a physician under 5 U.S.C. § 8101(2).²⁴ This evidence does not shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.²⁵

The term clear evidence of error is intended to represent a difficult standard. None of the evidence submitted demonstrates on its face that OWCP committed an error in terminating appellant's compensation for refusal of suitable work. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's December 8, 2015 decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

For these reasons, the Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (February 2016); *James Mirra*, 56 ECAB 738 (2005).

²² *R.C.*, Docket No. 16-1433 (issued October 4, 2017).

²³ *See B.L.*, Docket No. 17-1452 (issued October 25, 2017).

²⁴ *George H. Clark*, 56 ECAB 162 (2004).

²⁵ *J.G.*, Docket No. 17-0709 (issued July 21, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 21, 2016 is affirmed.

Issued: January 8, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board